

No. 89-1606

Supreme Court, U.S.  
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In The  
Supreme Court of the United States

October Term, 1989

MODEL MAGAZINE DISTRIBUTORS, INC.,

*Cross-Petitioner,*

v.

UNITED STATES OF AMERICA, et al.,

*Respondents.*

On Cross-Petition For A Writ Of Certiorari  
To The United States Court  
Of Appeals For The Fourth Circuit

CROSS-PETITIONER'S REPLY BRIEF

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May 18, 1990

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**CROSS-PETITIONER'S REPLY BRIEF**

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Model cross-petitioned because the Court of Appeals opinion rejected our First Amendment arguments and directed the production of Model business records which had no connection with Virginia.<sup>1</sup> Model's complaint is that the Fourth Circuit ignored the First Amendment

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<sup>1</sup> The same First Amendment issue concerning business records is presented by the companion case of *United States v. R. Enterprises, Inc. and MFR Court Street Books, Inc.*, #89-1436.

implications and the principle which Model contends is controlling.<sup>2</sup>

Nonetheless, in an attempt to block this Court's review of an important issue, the government presumptuously argues that Model "has no real disagreement with the legal standard applied by the Court of Appeals" (Gov. Ans. p. 5,7). This is simply not so. Model's cross-petition complains about the Fourth Circuit's failure to apply proper First Amendment standards. Our objection to a rule of law applied by the Fourth Circuit clearly involves a legal standard eligible for review by this Court.

The Fourth Circuit held that Model's business records were relevant to the investigation of shipments to Virginia because those records would "most likely reveal whether the company's business dealings in Virginia resulted in the sale \* \* \* of allegedly obscene material" in that state. (App. 8a,<sup>3</sup> emphasis supplied). Model, however, did not object to delivery of its business records which reflected sales to Virginia.<sup>4</sup> Model's complaint is

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<sup>2</sup> None of the cases relied upon by the Fourth Circuit involved an investigation of First Amendment activities.

Although Part III of *United States v. Cuthbertson*, 630 F.2d 139, 146-149 (3rd Cir 1980) did involve a subpoena for First Amendment material in a fraud indictment, significantly the Fourth Circuit did *not* rely on any part of the *Cuthbertson* First Amendment holding. Instead the Fourth Circuit held only that "mere hope" did not justify a subpoena under Rule 17(c). (App. 9a)

<sup>3</sup> Refers to page numbers of the Government Appendix in 89-1436.

<sup>4</sup> In fact Model did deliver all of its records showing sales into Virginia.

that under combined principles of the First and Fourth Amendments it should not be compelled to deliver virtually all of its business records without any showing they are connected to Virginia. This is the novel First Amendment issue which should be reviewed, and which the Government refused to address.

The Solicitor General relies on the language "the First Amendment does not invalidate every incidental burdening of the press \* \* \* " *Branzburg v. Hayes*, 408 U.S. 665, 682 (1972). (Gov. Ans. pg. 7 fn. 5). However, *Branzburg* sustained the grand jury subpoenas over First Amendment claims because the information sought related "directly" to the criminal conduct being investigated (408 U.S. at 701, 708). Clearly under the spirit of *Branzburg* there must be a showing of some possibility that the information sought by the subpoena will expose criminal activity. *Bursey v. United States*, 466 F.2d 1059 at 1083 (9th Cir. 1972). The government has never furnished any explanation as to how Model's sales to stores in the Northeast part of the United States is relevant to any alleged unlawful conduct in Virginia.

*In addition* the Solicitor General does not dispute that compliance with the subpoena will compel delivery of over 50,000 documents which have no conceivable connection with Virginia. The Government does not furnish any explanation as to just why this is an incidental burden on the First Amendment. Further, the Government does not answer Model's point that the compelled disclosure of the identity of all Model customers, having

*nothing* to do with Virginia, is precisely the type of injury that the First Amendment is designed to prevent.<sup>5</sup>

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CONCLUSION

The cross-petition for certiorari should be granted.

Respectfully submitted,

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<sup>5</sup> *Gibson v. Florida Legislative Investigation Committee*, 372 U.S. 539 (1963); *Bursey v. United States*, 466 F.2d at 1083, 1085.

